

# San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

## **ATTACHMENT A – ADDITIONAL FINDINGS COMMISSION CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CDO 2017.01**

In support of and as the basis for Commission Cease and Desist and Civil Penalty Order No. CDO 2017.01 (“Order”), the Commission hereby finds, in addition to those findings set forth in Section II of the Order, as follows:

### **I. INTRODUCTION**

A. On March 6, 1986, the Commission issued to the Port BCDC Permit No. 1985.019.00, for development activities along a six-block section of the Port’s waterfront property between Jefferson and Harrison Streets, known as Jack London Square.

B. On February 13, 1996, the Commission issued BCDC Permit No. 1985.019.08, which added Scott’s, a tenant of the Port, to the Port’s permit, and authorized the construction, use and maintenance of a 4,400-square-foot pavilion, in a portion of the Franklin Street Plaza, for shared public and private use, at a ratio of 80% public to 20% private<sup>1</sup>, and the installation of the café seating, benches, lighting and other site furnishings within the pavilion and the larger approximately 23,000 square-foot Franklin Street Plaza.

C. On July 8, 1997, the Commission split BCDC Permit No. 1985.019.08 into two permits:

1. BCDC Permit 1985.019.08A (hereafter “the Port’s Permit”) issued solely to the Port pertains to all of Jack London Square except the pavilion; and
2. BCDC Permit No. 1985.019.08B (hereinafter “the Permit”) issued to Scott’s and the Port pertains to only the pavilion.

D. On October 7, 1997, the Commission re-issued the Permit, as BCDC Permit No. 1985.19.09B, to correct the omission of a special condition that occurred during the permit split. The Permit has not been amended since that date.

### **II. ALLEGED VIOLATIONS**

There are seven categories of alleged violations described in Sections A through G, below. The following information is provided for each category: (1) nature of the violations; (2) legal basis for the violation; and (3) description and evidence of violations.

#### **A. Construction of Unpermitted Development**

1. **Nature of Violations.** Construction of unpermitted development consisting of a:
  - a. Roof extension west of the pavilion;
  - b. Storage area and stage west of the pavilion; and

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<sup>1</sup> The permit does not distinguish for and nonprofit events; they both constitute private use of a public space.

- c. Metal-framed entry doorway, wood and metal-framed wall, multiple moveable wall panels and ceiling tracks in the pavilion.
2. **Legal Basis for Violation.** Under California Government Code Section 66632(a), any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction shall secure a permit from the commission.
3. **Description and Evidence of Violations.** Scott's conducted the following activities within the area of the Commission's jurisdiction without obtaining a permit or permit amendment:
  - a. **Roof Extension West of the Pavilion.** As evidenced by Port staff member Julie Braun's observations outlined in an email dated April 24, 2015, and as shown in Google Earth aerial imagery, on or about March, 2000, Scott's constructed a roof extension joining its building to the pavilion.
  - b. **Storage Area and Stage West of the Pavilion.** As evidenced by the observations of Ms. Braun, as described in an email, dated April 24, 2015, to Adrienne Klein, Chief of Enforcement, and as shown in photographs taken by Ellen Miramontes, Bay Design Analyst, during a site visit on March 12, 2013, on or about July, 2011, Scott's constructed a 255-square foot storage area.
  - c. **Metal-framed Entry Doorway, Wood and Metal-Framed Wall, Multiple Moveable Wall Panels and Ceiling Tracks in the Pavilion.** As evidenced by the observations of Tammy Borichevsky and Keith Miller, California Canoe and Kayak, in emails, dated February 25, March 3, and March 6, 2013, the first two of which included photographs, between December 28, 2012, and March 6, 2013, Scott's constructed a permanent wall in the northwest corner of the pavilion, a permanent metal-framed entry doorway on the east side of the pavilion and a retractable wall panel system to enclose the pavilion.

**B. Non-permit Compliant Use of the Pavilion.**

1. **Nature of Violations.** Non-permit compliant use of the pavilion through excessive private use:
  - a. **Minimum Number of Public Use Days (annual).** Providing fewer than 292 public use days per year;
  - b. **Minimum Number of Public Use Weekend Days and Nights<sup>2</sup> (winter season average).** Providing, on average per month during winter season (January – April, November and December), fewer than five (5) public use weekend days and nights;

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<sup>2</sup> Permit Exhibit A defines "weekend nights" as Friday and Saturday and "weekend days" as Saturday and Sunday, which this report collectively refers to as "weekend days and nights".

- c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Holding, on average per month during winter season, more than four (4) private use weekend days and nights;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Holding, on average per month during summer season (May – October), more than three (3) private use weekend days and nights;
  - e. **Minimum Number of Public Use Weekend Days and Nights Per Month.** Providing fewer than three (3) public use weekend days and nights per month; and
  - f. **Maximum Number of Consecutive Private Use Days.** Holding more than two consecutive private use days.
2. **Legal Basis for Violations.** Special Condition II.B of the Permit and Permit Exhibit A, entitled “Guidelines for Private Use of Public Pavilion,” together set forth the following requirements:
- a. The pavilion must be publicly available for 292 days/year and may be privately occupied for a maximum of 73 days/year;
  - b. The pavilion must be available for public use an average of five (5) weekend days and nights per month during the winter season;
  - c. The average number of weekend days and nights for private use may not exceed four (4) weekend days and nights per month during the winter season;
  - d. The average number of weekend days and nights for private use may not exceed three (3) weekend days and nights per month during the summer season;
  - e. There must be at least three (3) weekend days and nights available for public use every month; and
  - f. There must not be more than two consecutive private use days.
3. **Description and Evidence of Violations.** Staff relied on data from the Port’s property manager, who dispatched a security officer to monitor pavilion use on a daily basis, for the non-permit compliant uses of the pavilion that occurred in 2004 through 2007 and 2012 through 2015. Between 2008 and 2011, Port-generated data was not provided. In the absence of data from the Port’s property manager, staff relied on data from Scott’s for the non-permit compliant uses of the pavilion that occurred in 2008 through 2011.<sup>3</sup>

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<sup>3</sup> Commission staff believes that the data from Scott’s for 2008, 2009, 2010, and 2011 under-reports private pavilion use because whenever two sets of data are available, the Port property manager’s data shows more private pavilion use than Scott’s data.

4. **2004.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated March 31, 2005, as adjusted by Commission staff:<sup>4</sup>
  - a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 268 of the required 292 days;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
  - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of five (5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of seven (7) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
  - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** In May, there were only two (2) [vs. the minimum three (3)] required public use weekend days and nights; and
  - f. **Maximum Number of Consecutive Private Use Days.** In May, there were six (6) more than two consecutive private use days. In June, there were four (4) more than two consecutive private use days. In August, there were two (2) more than two consecutive private use days.
5. **2005.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated March 31, 2006, as adjusted by staff:<sup>5</sup>

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<sup>4</sup> In calculating the minimum number of public use days, the Port's property manager counted two private events that occurred on the same day as two days of non-public use. BCDC staff has counted each of these 11 dual-event days as a single private use day, resulting in 11 more public access days than calculated by the Port's property manager.

In calculating the three monthly averages, the Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the minimum number of public use weekend days and nights per month nor the maximum number of consecutive private use days.

<sup>5</sup> In calculating the three monthly averages, Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the minimum number of public use weekend days and nights per month nor the maximum number of consecutive private use days.

- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 255 of the required 292 days;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
  - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of six and a half (6.5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of seven and six tenths (7.6) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
  - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
  - f. **Maximum Number of Consecutive Private Use Days.** In April there were six (6) more than two consecutive private use days. In May there were eight (8) more than two consecutive private use days. In June, there were two (2) more than two consecutive private use days. In October, there was one (1) more than two consecutive private use days. In November there were two (2) more than two consecutive private use days. In December there were nineteen (19) more than two consecutive private use days.
6. **2006.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated February 22, 2007, as adjusted by Commission staff:<sup>6</sup>
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 266 of the required 292 days;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;

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<sup>6</sup> In calculating the minimum number of public use days, the Port's property manager determined that there were 286 public use days whereas staff, reviewing the same data, determined that there were 266 public use days.

In calculating the three monthly averages, the Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the minimum number of public use weekend days and nights per month nor the maximum number of consecutive private use days.

- c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of five and a half (5.5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of six and a half (6.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
  - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
  - f. **Maximum Number of Consecutive Private Use Days.** In March there were eight (8) more than two consecutive private use days. In May, there was one (1) more than two consecutive private use days. In October, there were two (2) more than two consecutive private use days. In November, there were two (2) more than two consecutive private use days. In December, there were three (3) more than two consecutive private use days.
7. **2007.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated April 7, 2008, as adjusted by Commission staff:<sup>7</sup>
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 278 of the required 292 days;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
  - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of four and a half (4.5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of four and a half (4.5) [vs. the

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<sup>7</sup> In calculating the minimum number of public use days, the Port's property manager determined that there were 258 public use days whereas staff, reviewing the same data, determined that there were 278 public use days.

In calculating the three monthly averages, the Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the maximum number of consecutive private use days.

- maximum of three (3)] weekend days and nights in the months of May through October;
- e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
  - f. **Maximum Number of Consecutive Private Use Days.** In February there was one (1) more than two consecutive private use days. In May, there were two (2) more than two consecutive private use days. In December, there were six (6) more than two consecutive private use days.
8. **2008.** As evidenced by the information contained in the report prepared by Steve Hanson, Scott's consultant, dated July 19, 2013, as modified by Commission staff's calculations:<sup>8</sup>
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 273 of the required 292 days;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
  - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of four and eight tenths (4.8) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of five and eight tenths (5.8) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
  - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
  - f. **Maximum Number of Consecutive Private Use Days.** In March there was one (1) more than two consecutive private use days. In April, there were two (2) more than two consecutive private use days. In May there was one (1) more than two consecutive private use days. In August, there were three (3) more than two consecutive private use days. In October, there were two (2)

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<sup>8</sup> Scott's data consist of a list of 107 events, the date on which the event occurred, and the hours of duration of each event. The report totals the number of hours that the 107 events lasted and, based on this, concludes that the pavilion was occupied for a 19-day period, or at 5.35% of capacity. Scott's reached this conclusion by calculating the total number of hours the pavilion was used for private events and divided that number by 24 hours. Scott's methodology for calculating private pavilion use is flawed because any day the pavilion is subject to any private use for any amount of time counts as a private use day. Staff conducted independent calculations and reached significantly different conclusions.

more than two consecutive private use days. In December, there were two (2) more than two consecutive private use days.

9. **2009.** As evidenced by the information contained in the undated report from Scott's submitted by John Briscoe with a letter, dated June 20, 2013, as adjusted by Commission staff:<sup>9</sup>
- a. **Minimum Number of Public Use Days (annual).** No violation;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
  - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** No Violation;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of three and eight tenths (3.8) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
  - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
  - f. **Maximum Number of Consecutive Private Use Days.** In October there were two (2) more than two consecutive private use days. In December, there was one (1) more than two consecutive private use days.
10. **2010.** As evidenced by the information contained in the undated report from Scott's submitted by John Briscoe with a letter, dated June 20, 2013, as adjusted by Commission staff:<sup>10</sup>
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 277 of the required 292 days;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
  - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** No Violation;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of four (4) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;

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<sup>9</sup> Scott's data consist of a list of un-numbered events, and the date on which the event occurred. Staff conducted independent calculations to reach the conclusions cited herein.

<sup>10</sup> Scott's data consist of a list of un-numbered events and the date on which the event occurred. Staff conducted independent calculations to reach the conclusions cited herein.



- e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
  - f. **Maximum Number of Consecutive Private Use Days.** In April, there were for two (2) more than two consecutive private use days. In May there was one (1) more than two consecutive private use days. In June there was one (1) more than two consecutive private use days. In October, there were for four (4) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there was one (1) more than two consecutive private use days.
11. **2011.** As evidenced by the information contained in the undated report from Scott's submitted by John Briscoe with a letter, dated June 20, 2013, as adjusted by Commission staff:<sup>11</sup>
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 280 of the required 292 days;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
  - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** No Violation;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of five and one tenth (5.1) [vs. the maximum of three (3)] weekend days and nights in the months of May through October; and
  - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
  - f. **Maximum Number of Consecutive Private Use Days.** In March there was one (1) more than two consecutive private use days. In May, there were two (2) more than two consecutive private use days. In July there was one (1) more than two consecutive private use days. In September, there were two (2) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there were two (2) more than two consecutive private use days.
12. **2012.** As evidenced by the information contained in the report from Michael Meyer, Director, Cushman & Wakefield of California, Inc., dated April 18, 2013, as adjusted by Commission staff:<sup>12</sup>

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<sup>11</sup> Scott's data consist of a list of un-numbered events and the date on which the event occurred. Staff conducted independent calculations to reach the conclusions cited herein.

- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 171 of the required 292 days;
- b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
- c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of nine (9) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
- d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of eight and half (8.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
- e. **Minimum Number of Public Use Weekend Days and Nights (per month).** In March, there was only one (1) [vs. the minimum three (3)] required public use weekend days and nights. In May, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights. In September, there were only two (2) [vs. the minimum three (3)] required public use weekend days and nights. In December, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights; and
- f. **Maximum Number of Consecutive Private Use Days.** In January, there was one (1) more than two consecutive private use days. In February, there were two (2) more than two consecutive private use days. In March, there were 15 more than two consecutive private use days. In April, there were 10 more than two consecutive private use days. In May, there were 19 more than two consecutive private use days. In June, there were two (2) more than two consecutive private use days. In July, there were six (6) more than two consecutive private use days. In August, there were four (4) more than two consecutive private use days. In September, there were 15 more than two consecutive private use days. In October, there were four (4) more than two consecutive private use days. In November, there were six (6) more than two consecutive private use days. In December, when construction of the new pavilion enclosure commenced, there were twenty-nine (29) more than two consecutive private use days.

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<sup>12</sup> The Port's property manager determined that there were 182 private use days. The Port's property manager did not calculate the minimum number of public use days. The Port's property manager states that Scott's exceeded the number of consecutive private use days but did not provide this or any other calculations. Staff conducted independent calculations to reach the conclusions cited herein.

13. **2013.** As evidenced by the information contained in the report from Jennifer Koidal, General Manager, Cushman & Wakefield of California, Inc., dated March 12, 2014, as adjusted by Commission staff:<sup>13</sup>
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 207 of the required 292 days;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** On average, Scott's provided only four and six tenths (4.6) [vs. the minimum of five (5)] publicly available weekend days and nights in the months of January, February, March, April, November and December;
  - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of eight and six tenths (8.6) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of six and one tenths (6.1) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
  - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** In January, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights. In February, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights; and
  - f. **Maximum Number of Consecutive Private Use Days.** In January, there were twenty-nine (29) more than two consecutive private use days. In February, there were twenty-eight (28) more than two consecutive private use days. In March, when construction of the new pavilion enclosure was completed, there were eleven (11) more than two consecutive private use days. In April, there were five (5) more than two consecutive private use days. In October, there were three (3) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there were sixteen (16) more than two consecutive private use days.

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<sup>13</sup> The Port's property manager determined that there were 153 private use days. The Port's property manager did not calculate the minimum number of public use days. The Port's property manager states the number of weekend days and nights that the pavilion was in private use but it does not calculate the required averages. It states that Scott's exceeded the number of consecutive private use days but did not provide this or any other calculations. Staff conducted independent calculations to reach the conclusions cited herein.

14. **2014.** As evidenced by the information contained in the report from Michael Meyer, Director, Cushman & Wakefield of California, Inc., dated March 16, 2015, as adjusted by Commission staff:<sup>14</sup>
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 271 of the required 292 days;
  - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
  - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of five (5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
  - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of four and five tenths (4.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
  - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
  - f. **Maximum Number of Consecutive Private Use Days.** In April, there were five (5) more than two consecutive private use days. In May, there were three (3) more than two consecutive private use days. In June, there was one (1) more than two consecutive private use days. In October, there were three (3) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there were five (5) more than two consecutive private use days.
15. **2015.** As evidenced by the information contained in the report from Jennifer Koidal, Vice President and General Manager, CIM Group, dated July 18, 2016, as adjusted by Commission staff:<sup>15</sup>

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<sup>14</sup> The Port's property manager determined that there were 97 private use days. The Port's property manager did not calculate the minimum number of public use days. The Port's property manager states the number of weekend days and nights that the pavilion was in private use but it does not calculate the required averages. It states that Scott's exceeded the number of consecutive private use days but did not provide this or any other calculations. Staff conducted independent calculations to reach the conclusions cited herein.

<sup>15</sup> The Port's property manager did not calculate the required average number of weekend days and nights that the pavilion was in private use, but it does not calculate the required averages. It states that Scott's exceeded the number of consecutive private use days, closed the retractable wall panels too soon before some events and opened them too long after the end of some events, and lapsed in maintenance of floor and furniture. Staff conducted independent calculations to reach the conclusions cited herein.

- a. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of three and six tenths (3.6) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
  - b. **Maximum Number of Consecutive Private Use Days.** In February, there was one (1) more than two consecutive private use days. In May, there were three (3) more than two consecutive private use days. In October, there were four (4) more than two consecutive private use days. In December, there was one (1) more than two consecutive private use days.
- C. **Unpermitted Use of the Franklin and Broadway Street Plazas<sup>16</sup>**
  1. **Nature of Violations.** The installation, storage or display of unauthorized structures as follows:
    - a. Unauthorized use of the Broadway Street Plaza by displaying a promotional vehicle adjacent to the main restaurant entrance.
    - b. Unauthorized use of the Franklin Street Plaza (outside the pavilion boundary) by installing event tents, stanchions, and planters and by storing event-related equipment including planters.
  2. **Legal Basis for Violations.** Under California Government Code Section 66632(a), any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction shall secure a permit from the commission.
  3. **Description and Evidence of Violations.** Scott's conducted the following activities within the area of the Commission's jurisdiction without obtaining a permit or permit amendment:
    - a. As evidenced by an email from Steve Fagalde, Senior Vice President, Scott's, to Julie Braun, dated December 16, 2011, for a 30-day period each summer of the years 2000 through 2011, Scott's parked a promotional vehicle in the Broadway Street Plaza. This totals 330 days.
    - b. As evidenced by the photographs contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated March 31, 2005:
      - (1) On May 8, 2003, Scott's installed a tent in the Franklin Street Plaza.
      - (2) On May 9, 2003, Scott's installed a tent and stanchions in the Franklin Street Plaza.

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<sup>16</sup> Both the Franklin and Broadway Street Plazas are dedicated public access areas subject to the requirements of the Port's Permit.

- (3) On May 10, 2003, Scott's installed a tent, stanchions and planters in the Franklin Street Plaza.
- (4) On May 23, 2003, Scott's installed a tent and stanchions in the Franklin Street Plaza.
- (5) On May 25, 2003, Scott's installed a tent in the Franklin Street Plaza.
- (6) On September 20, 2003, Scott's installed a tent, stanchions and planters in the Franklin Street Plaza.
- c. For a five-day period between 9:00 am on December 7, and 9:00 am on December 12, 2012, Scott's installed a tent in the Franklin Street Plaza, as evidenced by: (a) Security Officer Tim Crosby's notes contained in the report submitted by Jennifer Koidal, General Manager, Cushman and Wakefield, dated March 12, 2014; and (b) A photograph attached to an email, dated December 19, 2012, from Maryann Starn, General Manager, Cushman and Wakefield to BCDC staff.
- d. As evidenced by a photograph attached to an email of the same date to Mr. Fagalde from Ms. Starn, Cushman and Wakefield, on December 19, 2012, Scott's installed an entry doorway and carpeted walkway with railings in the Franklin Street Plaza adjacent to the pavilion.
- e. As evidenced by photographs taken by Lee Huo, San Francisco Bay Trail, attached to an email of the same date, on February 10, 2014, Scott's stored event related equipment and placed planters in the Franklin Street Plaza.
- f. As evidenced by photographs taken by Keith Miller, California Canoe and Kayak, sometime before February 25, 2013, Scott's installed a tent in the Franklin Street Plaza, apparently for construction staging.
- g. As evidenced by photographs taken by Mr. Miller, California Canoe and Kayak, on April 28, 2013, Scott's installed planters in the Franklin Street Plaza.
- h. On April 30 and May 1, 2013, Scott's installed tents in the Franklin Street Plaza, as evidenced by: (a) Universal Protection Services' Security Officer Alan Humphrey's notes in the report submitted by Ms. Koidal, Cushman and Wakefield, dated March 12, 2014; and (b) Photographs taken by Mr. Miller, California Canoe and Kayak.
- i. As evidenced by four photographs taken by Security Officer Humphrey, submitted to Julie Braun, Port, by email, dated May 22, 2013, for a 26-hour period beginning on May 19, 2013, and ending on May 20, 2013, Scott's erected a tent in the Franklin Street Plaza.
- j. As evidenced by Universal Protection Services' Security Officer Dominic Wade's notes in the report submitted by Ms. Koidal, Cushman and Wakefield, dated

March 12, 2014, for a 24-hour period beginning at 7:00 am on June 8, 2013, and ending on June 9, 2013, Scott's erected a tent in the Franklin Street Plaza.

- k. As evidenced by observations of the staff of the Port of Oakland and summarized in a letter dated July 18, 2013, from Adrienne Klein, BCDC's Chief of Enforcement, to John Briscoe, Briscoe, Ivester and Bazel LLP, Scott's former counsel, for at least a 36-day period from June 12<sup>th</sup> to July 18, 2013, Scott's staged a promotional vehicle in the Broadway Plaza.
- l. As evidenced by a photograph attached to a letter dated December 19, 2013, to Mr. Fagalde from Ms. Koidal, General Manager, Cushman and Wakefield, on December 18, 2013, Scott's erected a tent in the Franklin Street Plaza.
- m. As evidenced by photographs taken by Ms. Klein during a site visit, on January 21, 2014, unauthorized planters and other equipment, including the public tables and chairs, were stored in the Franklin Street Plaza.
- n. On April 28, 2014, Scott's erected a tent in the Franklin Street Plaza (south of the pavilion) and also placed pipes and ladders in the Franklin Street Plaza, creating non-public conditions, as evidenced by: (a) the photograph attached to the letter, dated April 30, 2014, to Mr. Fagalde from Jennifer Koidal, Cushman and Wakefield; (b) observations by Sean Palmer, General Manager, Kincaid's Restaurant; and (c) observations by Tammy Borichevsky, California Canoe and Kayak, in an email dated April 28, 2014.
- o. As evidenced by the letter to Mr. Fagalde, dated July 2, 2014, from Monique Scott, Assistant Property Manager, Cushman and Wakefield, on July 2, 2014, Scott's staged a promotional vehicle in the Broadway Street Plaza.
- p. As evidenced by Ms. Klein's observations during a site visit on September 19, 2014, and documented with photographs, the following conditions existed at the public pavilion:
  - (1) Despite being publicly available, two of the retractable wall panels were in place along the southern, waterside of the pavilion;
  - (2) Seven unauthorized planters were in place, two next to the stage/storage area and five in the Port's public access area near the southern exit door from the restaurant;
  - (3) Several unauthorized benches were located inside the pavilion in line with the structural support columns; and
  - (4) An hydraulic jack was stored in the northwest corner of the pavilion.
- q. For approximately 40 hours beginning at 8:20 am on December 7, 2014, and ending at midnight on December 8, 2014, Scott's erected a tent in the Franklin Street Plaza and placed planters and stanchions, as evidenced by: (a) Universal

Protection Services' Security Officer Rashema Jacobs' notes in the report, dated March 16, 2015, from Ms. Koidal, Cushman and Wakefield; and (b) three photographs submitted by Mr. Miller, California Canoe and Kayak, via email on December 8, 2014.

- r. As evidenced by Security Officer Rashema Jacobs' notes in the report, dated March 16, 2015, from Ms. Koidal, Cushman and Wakefield, for approximately 15 hours beginning at 8:25 am on December 16, 2014, Scott's erected a tent in the Franklin Street Plaza.
- s. As evidenced by Keith Miller's and Jennifer Koidal's observations on September 21, 2015, Scott's erected a red carpet, stanchions and dining tables in the Franklin Street Plaza.
- t. As evidenced by photographs taken by Ade Barari on August 14, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, Scott's placed eleven planters (10 terra cotta and one metal) in the Franklin Street Plaza.
- u. As evidenced by photographs taken by Tammy Borichevsky and submitted by Keith Miller on August 15, 2016, Scott's stored four stacks of private dining tables, two serving tables, one mechanical lift, and placed seven planters (five terracotta and one metal) in the Franklin Street Plaza.
- v. As evidenced by photographs taken by Mark Madamba on August 16, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, Scott's placed eight terra cotta planters and one mechanical lift in the Franklin Street Plaza.
- w. As evidenced by photographs taken by Mark Madamba on August 17, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, Scott's placed four terra cotta planters and one mechanical lift in the Franklin Street Plaza.

#### **D. Untimely Submittal of Private Event Schedules**

##### **1. Nature of Violations**

- a. Failure by Scott's to submit to the Port by the 1<sup>st</sup> of January, April, July and October of each year, a quarterly calendar of events; and
- b. Failure by the Port to submit to BCDC by March 1<sup>st</sup> of every year, a summary of the scheduled events for the previous year; and
- c. Holding unscheduled events.

##### **2. Legal Basis For Violations.** Special Condition II.B of the permit including Permit Exhibit A, entitled "Guidelines for Private Use of Public Pavilion," sets forth the following requirements:

- a. **Quarterly Calendar of Events.** By the 1<sup>st</sup> of January, April, July and October of each year, Scott's must submit a quarterly calendar of events to the Port.



- b. **Annual Summary of Events.** By March 1<sup>st</sup> of every year, the Port must submit a summary of the scheduled events for the previous year to BCDC.
  - c. **Unscheduled Events.** The holding of an event within the pavilion or public access plaza not listed in the schedule of events, or the approval of a schedule of events that is inconsistent with the Permit Exhibit A, Guidelines for Private Use of the Pavilion, is prohibited.
3. **Description and Evidence of Violations.**
- a. **Quarterly Calendar of Events<sup>17</sup>:**
    - (1) Scott's did not submit a 2013 first quarter calendar of events. On April 5, 2013 (and again on October 1, 2013, revised), Scott's submitted a "committed" calendar of events from April 3<sup>rd</sup> through December 2013, as evidenced by an email from Jennifer Koidal, dated July 13, 2015, which renders these four reports a cumulative total of 97 days late, as of July 1, 2016;
    - (2) On January 13, 2014, Scott's submitted its first quarter calendar of events. On March 5, 2014, Scott's submitted its second quarter calendar of events. On October 1, 2014, Scott's submitted a third and fourth quarterly "activity report", as evidenced by an email from Jennifer Koidal, dated July 13, 2015, which renders these four reports a cumulative total of 104 days late;
    - (3) On January 16, 2015, Scott's submitted its first quarter calendar of events. On June 9, 2015, Scott's submitted its second quarter calendar of events. On July 1, 2015, Scott's submitted its third quarter calendar of events. Scott's did not submit a 2015 fourth quarter calendar of events, as evidenced by an email from Jennifer Koidal, dated July 13, 2015, which renders these three reports a cumulative total of 357 days late, as of July 1, 2016.
    - (4) Scott's did not submit a 2016 first quarter calendar of events. On April 27, 2016 (and again on May 18, 2016, revised), Scott's submitted its second quarter calendar of events. On April 27, 2016, Scott's submitted its third<sup>18</sup> quarter calendars of events, as evidenced by an email from Jennifer Koidal, dated July 18, 2016, which renders these three reports a cumulative total of 208 days late, as of July 1, 2016.

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<sup>17</sup> Following the issuance of an enforcement letter, dated May 16, 2013, the Permittees submitted the annual reports for Years 2008 through 2012 on June 20, 2013, ranging from five years to three months past due. As described in staff's response to this submittal, dated July 18, 2013, staff accepted the annual reports as retroactive fulfillment of the requirement to provide the quarterly reports and the Permittees accrued no standardized fines for these 24 violations because they submitted the reports within 35 days of staff's enforcement letter, dated May 16, 2013.

<sup>18</sup> Scott's also submitted its fourth quarter report on April 27, 2016.

b. **Annual Summary of Events.** The cumulative total number of days late that the Permittees have submitted the annual summaries of events is 230 days as outlined below:

- (1) In 2003, the Permittees submitted the annual summary of events 54 days late, as evidenced by the letter, dated April 23, 2004, from Rhonda Hirata, Cushman and Wakefield, to Adrienne Klein.
- (2) In 2004, the Permittees submitted the annual summary of events 30 days late, as evidenced by the letter, dated March 31, 2005, from Rhonda Hirata, Jack London Square Marketing, to Adrienne Klein.
- (3) In 2005, the Permittees submitted the annual summary of events 30 days late, as evidenced by the letter, dated March 31, 2006, from Rhonda Hirata, Jack London Square Marketing, to Adrienne Klein.
- (4) In 2006, the Permittees submitted the annual summary of events 53 days late, as evidenced by the letter, dated February 22, 2007, from Rhonda Hirata, Jack London Square Marketing, to Adrienne Klein.
- (5) In 2007, the Permittees submitted the annual summary of events 37 days late, as evidenced by the letter, dated April 7, 2008, from Brian Lee, Cushman and Wakefield, to Adrienne Klein.<sup>19</sup>
- (6) In 2013, the Permittees submitted the annual summary of events 11 days late, as evidenced by the letter, dated March 12, 2014, from Jennifer Koidal, Cushman and Wakefield to Adrienne Klein.
- (7) In 2014, the Permittees submitted the annual summary of events 15 days late, as evidenced by the letter, dated March 16, 2015, from Jennifer Koidal, Cushman and Wakefield to Adrienne Klein.
- (8) In 2015, the Permittees submitted the annual summary of events 149 days late, as evidenced by the letter, dated July 18, 2016, from Jennifer Koidal, CIM Group to Adrienne Klein.

**E. Failure to Dedicate the Pavilion Public Access Area**

1. **Nature of Violation.** Failure to dedicate the required public access area before commencement of construction of the pavilion.

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<sup>19</sup> Following the issuance of an enforcement letter, dated May 16, 2013, the Permittees submitted the annual reports for Years 2008 through 2012 on June 20, 2013, ranging from five years to three months past due. As described in staff's of response to this submittal, dated July 18, 2013, the Permittees accrued no standardized fines for these violations because they submitted the reports within 35 days of staff's enforcement letter, which is a penalty-free period within which a violator may resolve a violation, as provided for by Commission Regulation 11386.

2. **Legal Basis for Violation.** Special Condition II.B.3, Permanent Guarantee, requires the Permittees to dedicate the 4,400-square-foot public access area known as the pavilion prior to the commencement of construction.
3. **Description and Evidence of Violations.**
  - a. Sometime between February 13, 1996, the date of issuance of the permit amendment that authorized the pavilion and 2000, exact date unknown, the Permittees commenced and completed construction of the pavilion.
  - b. By letter dated May 16, 2013, Ms. Klein notified the Permittees that they had failed to dedicate the 4,400-square-foot public access area.
  - c. Following notification of this Permit violation, between May 16 and September 11, 2013, the Permittees prepared several draft legal instruments for staff's review.
  - d. On September 11, 2013, BCDC Legal Intern Simran Mahal conditionally approved a draft legal instrument, as evidenced by an email of the same date to Peter Prows, Briscoe, Ivester & Bazel, LLP, counsel to Scott's.
  - e. Between September 11 and December 13, 2013, the Permittees determined that the area covered by the lease between the Port and Scott's does not overlap with the boundary of the pavilion.
  - f. In a series of email messages between April 18 and July 24, 2014, Deputy Port Attorney Joshua Safran raised a number of issues regarding the terms of the dedication of the pavilion as a public access area. The most significant of these issues was a proposal by Mr. Safran that, due to restrictions on the Port's ability to encumber tidal lands conveyed to it by the State of California, the term of the public access dedication to be made by Scott's and the Port be limited to 66-years. Commission Staff Counsel John Bowers responded to this proposal by pointing out that that Port's proposal was based on a misconception as to the term of the dedication required by the Permit, which Mr. Safran had characterized as "permanent" or "perpetual." As Mr. Bowers advised Mr. Safran, the term of the dedication required by the Permit is not in fact "permanent," but rather, pursuant to section 10503(c) of the Commission's regulations, is limited to the duration of the permit and of the improvements that it authorizes. Mr. Bowers further advised Mr. Safran that any change in the terms of the Permit, such as a change in the term or duration of the public access dedication required by the Permit, could only occur by means of an amendment to the Permit, and that any limitation on the term of the Permit's dedication requirement would need to be accompanied by a corresponding change or reduction in the term of the Permit itself.

- g. As of the date of this Order, the Co-Permittees have neither dedicated the 4,400-square-foot public access area in the manner required by the Permit nor submitted an application to amend the Permit to change the terms, including duration, of the Permit's dedication requirement.

**F. Failure to Provide All of the Required Public Access Improvements During Public Use Days**

1. **Nature of Violation.** Failure to install and maintain on a continuous basis since the date of issuance of the permit all of the required public access improvements when the pavilion was open.
2. **Legal Basis of Violation**
  - a. Special Condition II.B.5.c, Public Access, requires the Permittees to install “[a]t least four...public access signs, two permanent and two temporary, to facilitate shoreline public access between Franklin Street and Broadway on the Bay side of Scott’s Restaurant. The temporary signs shall be installed and removed when approved private events are held.”<sup>20</sup>
  - b. Special Condition II.B.5.d, Public Access, requires the Permittees to install “[a]t least 15 tables and 35 chairs...to be in place at all times, except when the pavilion is needed for approved private events or other approved public events.”
3. **Description and Evidence of Violations.**
  - a. As evidenced by personal observations of Keith Miller, California Canoe and Kayak, and Julie Braun, Port, in emails dated April 16 and 24, 2015, respectively, Scott’s failed to install all of the required tables, chairs and signs for a 13-year period from January 1, 2000 through July 22, 2013;
  - b. As evidenced by a photograph, dated July 22, 2013, taken by Mr. Fagalde and submitted by Peter Prows, Briscoe, Ivester and Bazel LLP, former counsel to Scott’s, on July 22, 2013, Scott’s partially resolved this violation by installing tables and chairs;
  - c. As evidenced by Ms. Klein’s observations during a site visit on September 19, 2014 and documented with photographs, the required tables and chairs were not provided;
  - d. As evidenced by two emails, dated April 16, 2014, and April 30, 2015, both from Keith Miller, Scott’s has failed to install the moveable “Public Shore” signs alongside the public tables and chairs; and

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<sup>20</sup> One public access sign shall be installed at the entrance to the gangway leading to the kayak launch float that describes the rules and hours for public use of the kayak launch float.

- e. As evidenced by photographs taken by Robert Howard on August 13, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs.
- f. As evidenced by photographs taken by Ade Bakari on August 14, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs.
- g. As evidenced by photographs taken by Mark Madamba on August 15, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs; one sign was placed bayward and outside the perimeter of the pavilion next to the bench overlooking the Bay.
- h. As evidenced by photographs taken by Mark Madamba on August 16, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs.
- i. As evidenced by an email, dated August 16, 2016, from Tammy Borichevsky and Keith Miller, Scott's has failed to install both moveable "Public Shore" signs alongside the public tables and chairs.

**G. Failure to Obtain Plan Approval Prior to Installation of Public Access Improvements**

- 1. **Nature of Violation.** Failure to obtain written plan approval from the BCDC staff in advance of installing public tables and chairs.
- 2. **Legal Basis of Violations.** Special Condition II.A, Specific Plans and Plan Review, of the Permit states, in part, that "[n]o work whatsoever shall be commenced...until final precise ...plan information for that portion of the work have been submitted to, reviewed and approved in writing by or on behalf of the Commission. The specific drawings and information required will be determined by the staff."
- 3. **Description and Evidence of Violations.**
  - a. As evidenced by the photograph, dated July 22, 2013, taken by Steve Fagalde and submitted by Mr. Prows, on July 22, 2013, Scott's installed the required public access tables and chairs prior to receiving BCDC staff review and approval of the plans required by Special Condition II.A of the Permit.
  - b. By email to Ms. Klein, dated September 19, 2013, Mr. Prows submitted a set of design specifications for the 15 public access tables and 35 chairs.

- c. By email to Ms. Klein, dated October 15, 2013, Mr. Prows submitted a proposed public access signage plan as required by Special Condition II.B.5.c of the Permit.<sup>21</sup>
- d. By email to Ms. Klein, dated October 16, 2013, Mr. Prows submitted a plan-view illustration showing the proposed locations of the public furniture for staff's review and approval.<sup>22</sup>
- e. By letter to Mr. Prows, dated October 18, 2013, Ms. Miramontes retroactively approved the design specifications for the public access tables and chairs and requested changes to the signage plan.
- f. By email to Ms. Miramontes, dated October 30, 2013, Mr. Prows submitted a revised signage plan.<sup>23</sup>
- g. By letter to Mr. Prows dated November 19, 2013, Ms. Miramontes approved the signage plans, which resolved this violation.

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<sup>21</sup> The plans, which are not dated and do not indicate who prepared them, have the following titles: "Public Pavilion Regulatory Signs: Location/Site Plan," "Public Pavilion Regulatory Signs: Exhibit Plan" and "Public Pavilion Regulatory Signs: Exhibit Plan, Sign Specifications."

<sup>22</sup> The plans, which are not dated and do not indicate who prepared them, have the following titles: "Public Pavilion Table and Chair Exhibit" and "Public Pavilion Table and Chair Exhibit, Page 2."

<sup>23</sup> The plans are entitled "Public Pavilion Regulatory Sign Specifications," dated October 22, 2013, and prepared by Steve Hanson.